No. 15546

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BERT RUUD AND EMMA RUUD,
APPELLANTS

VS.

UNITED STATES OF AMERICA,
APPELLEE

BRIEF OF APPELLANTS

Appeal From the United States District Court
For the District of Idaho, Eastern Division

HOLDEN HOLDEN & KIDWELL
Idaho Falls, Idaho
Attorneys for Appellants

Filed August....., 1957

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STATEMENT OF JURISDICTION

Jurisdiction is vested in the United States District Court by virtue of 28 USCA Sec. 1358, providing that district courts shall have original jurisdiction in all proceedings to condemn real estate for the use of the United States or its departments or agencies.

Jurisdiction is further based on 28 USCA Sec. 1291, providing Court of Appeal shall have jurisdiction of appeals from all final decisions of the District Courts of the United States.

TABLE OF CASES

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STATEMENT OF THE CASE

On March 4, 1955, the United States, as plaintiff, filed an action in eminent domain against appellants, as defendants, together with many other defendants, to condemn 1001.99 acres of land in Bonneville County, Idaho.

The property condemned consisted of three tracts, being Tract 34, a small two acre tract; Tract 41, known as the "home place", consisting of 671.12 acres; and Tract 77, designated as "Alpine property", consisting of 328.87 acres. Both plaintiff and defendants, Bert Ruud and Emma Ruud, requested trial by jury as to issue of just compensation.

Various other individuals were named as parties defendant. At the time of trial, however, either by default or disclaimer, all defendants had been eliminated with exception of these appellants, the defendants Archie Hill and Zola M. Hill, his wife, who claimed an interest in the premises by virtue of a lease of the hotel building located on the Alpine property; and defendant Robert Morris, who claimed an interest in the premises by virtue of a mining lease. A motion to dismiss the Hills as parties defendant was filed by the United States on November 2, 1955, and this motion was pending at the time of commencement of trial of the action. (p. 9)

Trial was held commencing November 7, 1955. At the start of the trial, after selection of the jury, the United States, appellants and Robert Morris entered

into a stipulation wherein Morris was awarded $750.00 as just compensation. (p. 16) Archie Hill and Zola Hill, his wife, appeared with counsel at time of trial and over objection of Appellant's counsel participated in selection of jury. Appellant's counsel urged that the motion to dismiss as to Hills be heard before the selection of the jury and objected to Hills' attorney participating in the selection of the jury until after the motion to dismiss was disposed of. While the jury was viewing the premises, the court heard arguments of counsel on the motion to dismiss as to the defendants Hills, and granted the motion on the grounds they had no compensable interest. (p. 17)

During the trial of the case, considerable testimony was developed from appraisers for the government, Mr. Dick, Mr. Gourley, Mr. Newell and Mr. Carruthers, as to whether the Alpine ranch and a large portion of the home ranch were "dry-farm" land and had to be summer fallowed; whether the land was capable of growing a crop each year; whether the home ranch had adequate irrigation water to raise a crop each year; and the nature and kind of crops the lands were suitable for growing. The evidence showed the defendants' witness, Mr. Preston Ellsworth, was an experienced farmer, familiar with land values in the area during the time in question, and who had a personal knowledge of farming in the area in question, and particularly with respect to the Ruuds' land for many years. Mr. Ellsworth was not permitted to testi-

fy as to the highest and best use to which the properties could be put at the time of the condemnation (p. 385), nor was he permitted to express his opinion as to the fair market value of the lands. (p. 385)

The same situation arose with reference to defendants' witness, Mr. D. Worth Smith, an experienced farmer who had lived directly across the road from the Ruuds' home ranch for some forty years. The trial court refused to let him testify as to his opinion of the highest and best use to which the land could be put, or as to its fair market value. (p. 387) The Court, in not permitting the witnesses Ellsworth and Smith to testify as to highest and best use and fair market value of the land, limited testimony on these issues to expert real estate appraisers. He refused to permit experienced farmers living in the area and familiar with the properties in question and land values in the area to testify on these matters.

The jury returned a verdict for $171,400.00, which was the value testified to by Mr. Newell, one of the government appraisers.

A motion for new trial on behalf of Bert Ruud and Emma Ruud was denied. This appeal followed.

SPECIFICATION OF ERROR

1. The Trial Court erred in refusing and failing to hear the United States' motion to dismiss, directed at Archie Hill and Zola M. Hill, prior to the selection of the jury. The motion was filed prior to time of trial, filing being made on November 2. On November 7, at time of trial, counsel for the Hills participated in the selection of the jury. Following selection of jury, the Motion was heard by the Court, and the action dismissed as to Archie and Zola M. Hill. (page 9, 17 of printed record). The court then stated to the jury: "Before we start with the evidence in this case, I think I should tell you, Ladies and Gentlemen of the jury, that when you were examined in your voir dire, there were several other defendants in this case. However, they have been eliminated from this case at this time and you will not be concerned with other parties other than Mr. Ruud and his wife, the case is confined to them now, and to their holdings. All of the other defendants are now out of the case and I make this statement to you so that you will not be concerned or looking for other defendants. They are (9) not here nor are they involved any further." (Page 26 of record)

2. The Court erred in refusing to permit Preston Ellsworth, an experienced farmer operating 6,500 acres of land, who had been familiar with farming operations in the Swan Valley area all of his life and with the Ruud lands for twenty-five years and who was familiar with land values in this area, to give an

opinion as to the highest and best use to which the home ranch could be put on March 4, 1955.

The objection of United States counsel was "Just a moment. I'll object to that question, your Honor, on the grounds that this witness hasn't been qualified as an expert on appraising real estate". (p. 385)

The Court: "I'll have to sustain the objection, Mr. Holden". (p. 385)

Mr. Holden: "Your Honor, we aren't qualifying him as an expert, but as a man who has been engaged in farming over the years, sixty some odd years, familiar with land values in Bonneville County, particularly in Swan Valley, Grand Valley and Alpine, and who has discussed values with farmers and who has checked production of crops in the area and one familiar with valuations." (p. 386)

The Court: "I can't change my ruling unless you can show qualifications in connection with making an appraisal of land." (p. 386)

3. The Court erred in refusing to permit Preston Ellsworth, a competent witness for the defendants, to give his opinion as to the fair market value of the lands involved in this action.

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The Court: I can't change my ruling unless you can show qualifications in connection with making an appraisal of land." (p. 386)

4. The court erred in refusing to permit D Worth Smith, a farmer who lived adjoining the Ruud Home Ranch for forty years and who is familiar with land values in the area, and a competent witness produced by the defendants, to give an opinion as to the highest and best use to which the tracts of farm land involved in this action could be put on March 4, 1955.

Mr. Holden: "Now, your Honor, with respect to Mr. Smith, Mr. Smith lives right across from the Ruud Ranch, and counsel, and has lived there for some forty years. He will testify that he is familiar with land values, ranch land, and those values in the area. Now, we don't intend to qualify him as an expert appraiser." (p. 387)

The Court: "I would have to make the same ruling." (p. 387)

5. The court erred in refusing to permit D. Worth Smith, a competent witness produced by the de-

fendants, to give an opinion as to the fair market value of the lands involved in this action on the date of taking.

Mr. Holden: "Now, your Honor, with respect to Mr. Smith, Mr. Smith lives right across from the Ruud Ranch, and counsel, and has lived there for some forty years. He will testify that he is familiar with land values, ranch land, and those values in the area. Now, we don't intend to qualify him as an expert appraiser." (p. 387)

The Court: "I would have to make the same ruling." (p. 387)

6. The Court erred in requiring every witness testifying as to highest and best use of property to be a real estate appraiser.

7. The Court erred in requiring that every witness testifying as to fair market value be qualified as an expert real estate appraiser.

8. The verdict is inadequate and appears to have been given under the influence of passion and prejudice.

9. The verdict is contrary to evidence.

10. The verdict is contrary to law.

11. The Court erred in refusing to grant defendants a new trial.

ARGUMENT

The argument will be divided into Major headings, as follows:

Specifications of error numbered 2, 3 and 6 will be discussed as a unit, since the points and authorities cited, and the argument, will apply to all these specifications.

Specifications of error numbered 4, 5 and 7 will be discussed as a unit, for the same reason.

Specifications numbered 8, 9 and 10 will be discussed as a unit, for the same reason.

Error In Refusing to Permit Farmers to Testify As to Highest and Best Use.

The same argument will suffice for the refusal of the Trial Court to permit the testimony of the two witnesses, Ellsworth and Smith.

The background of the witness, Preston Ellsworth, appears in printed transcript commencing on page 379 and may be summarized as follows: Is farmer, lives in Lewisville, Idaho, married, in business of farming and livestock and has been in that business

for 68 years, farms 6,500 acres and grows grain, sugar beets, potatoes, hay, seed peas, alfalfa, livestock; is familiar with farm and land values in Bonneville County and the Grand Valley and Alpine areas; knows Ruud ranch since early thirties; knows production of crops in the area, cost factors in raising crops; is familiar with land values in the area; had been over the premises. With this background, the witness was asked his opinion as to the highest and best use of the premises on the date of its taking and an objection of United States, on the grounds the witness was not qualified as an expert on appraising real estate was sustained (f. 385).

A similar objection was sustained to testimony of D. Worth Smith, an experienced farmer who lived directly across the road from the Ruud "Home ranch" (p. 387)

> "All evidence should be admitted in the trial of a case which is admissible under statutes of the United States, or under the rules of evidence heretofore applied in the Courts of the United States ..... or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held. In any case, the statute or rule which favors the reception of evidence governs .... the competency of a witness to testify shall be determined in like manner.
>
> Rule 43 a, Rules of Civil Procedure

The Idaho Courts have adopted the practice of

permitting broadest latitude in the admission of evidence to show value.

State vs. Styner, 58 Idaho 233
72 Pac (2d) 699

The Idaho Courts have ruled upon the question of competency of witnesses to express an opinion of value. In the case of Idaho Western Ry., Co. vs. Columbia etc. Synod, 20 Idaho 568, 119 Pac. 60, the Idaho Supreme Court stated: "Evidence of value and damages in such cases as this should not be limited or confined to so-called expert witnesses; indeed it could not be, for the reason that it would be practically impossible to tell just what would constitute an expert in such matters." The Court went on to quote with approval, "The fact that the owner is denied the ordinary right to refuse to sell his own property . . . afford no reason for awarding him more than a just compensation; but it does afford good reason why he should be given every opportunity to disclose to the jury the real character of the property — its location; its surroundings; its use; its improvements, if any, and their age, condition and quality, its adaptability to any special use or purpose; its productiveness and rental value; and in short, everything which affects salability and value as between buyers and sellers generally."

Idaho Etc. Ry. Co. vs. Columbia Synod
119 Pac. 60, 20 Idaho 568

The same rule holds in Federal Courts. The Landowner is entitled to submit evidence as to the highest

and best use to which the property could be put.

United States vs. Powelson
319 U. S. 266
63 S. Ct. 1047
87 L. Ed. 1390

Atlantic Coast Line R. Co. vs. U. S.
132 Fed. (2d) 959

National Bank vs. U. S.
275 Fed. 855

McCandless vs. U. S.
298 U. S. 342
80 L. Ed. 1205

The views of the United States Supreme Court were clearly expressed in the case of McCandless vs. U. S., supra. The Court stated: "An erroneous ruling which relates to the substantial rights of a party is grounds for reversal unless it affirmatively appears from the whole record it was not prejudicial . . . . in an eminent domain proceeding, the vital issue is just compensation. The proof here offered necessarily related to the value of the land when used for a purpose to which it probably could be put within the rule laid down by the Olsen case (citing). To exclude from consideration of the jury evidence of this elementary character could not be otherwise than prejudicial.

McCandless vs. United States
298 U. S. 342
80 L. Ed. 1205

Error in Refusing to Permit Farmers to give Opinion As to Market Value of Premises

The trial court refused to permit the two witnesses, Ellsworth and Smith, both experienced farmers, well acquainted with the property taken by the Government and market values of lands in the area, to express an opinion as to the fair market value of the premises.

> Farmers living in the vicinity of the area condemned may testify as to its value, even though no sales have been made to their knowledge of that or similar property .... the occupation of farming itself is usually deemed a sufficient foundation for their assertion of knowledge of value of agricultural property in their region, enabling them to judge the value of the particular property.

Montana Ry. Co. vs. Warren
34 L. Ed. 681
137 U. S. 348
11 S. Ct. 96

Pacific Livestock Co. vs. Warm Springs
Irr. Dist.
270 Fed. 555

Watkins vs. Mtn. Home Irr. Co.,
33 Idaho 623
197 Pac. 247

2 Lewis, Eminent Domain
Sec. 656, p. 1127
10 R. C. L. 218
Annotation 159 A. L. R. at page 11

It is reversible error to exclude opinion as to value of farm offered by farmers if they are familiar with the farm and with values in the neighborhood.

Cole vs. Ackerson, (N. Y.) 25 NYS (2d) 891

The attention of the Court is particularly called to the discussion in the case of Provo River Water Users Ass'n., vs. Carlson, (Utah) 133 Pac. (2d) 777 at page 782. The Court stated: (farmers) were familiar with land sales in the neighborhood and with the use and productivity of the land. The fact they were not trained real estate salesmen would not disqualify them. Witnesses who are familiar with the character of land near their own lands, acquainted with the conditions of moisture, type of soil, depth of soil and other physical factors frequently have a better idea of land values in the neighborhood than strangers who may be real estate salesmen but who have no detailed knowledge of the characteristics of the land."

Provo River Water Users Ass'n. vs. Carlson
(Utah)
133 Pac. (2d) 777

The point is especially significant in view of the record. The testimony of Mr. Dick, (appearing at page 32, et seq of record) was that he was manager of an irrigation district; that he appraised the land on the

basis of use being made at the time of appraisal (p. 48); that he made no effort to determine yield of the premises (p. 50); and that he didn't consider possibility of raising wheat (p. 58); potatoes (p. 58) or alfalfa seed (p. 60) and his appraisal was based upon the premise that the land would have to lie idle every other year — be summer fallowed, in order to produce a crop (p. 61).

Mr. Gourley, another United States appraiser, testified he was an auctioneer and banker (p. 124); that he made his appraisal on the basis of the use to which the land was being put (p. 146); and based on summer fallowing of the ground — a crop every other year (p. 150).

Mr. Newell, a U. S. appraiser, **was the only farmer permitted to give an opinion as to highest and best use and as to value.** He lived in Emmett, Idaho, which is approximately 400 miles from the land condemned (152); he based his appraisal on the yield on the ground at the time he saw it (p. 157) and didn't check into irrigating water (p. 195).

Of all the witnesses produced, the witness Preston Ellsworth was the only one, qualified from actual experience, to testify as to growing of potatoes. There was considerable discrepancy in testimony as to whether potatoes could be grown in the area, and the testimony of the person best qualified to express an opinion was excluded.

Inadequacy of Verdict, Verdict being Contrary to Law and Contrary to Evidence.

These questions will be discussed together, inasmuch as the same argument will apply to each.

The figure returned by the jury was the exact appraisal testified to by Mr. Newell, the farmer witness produced by the Government. The testimony of Mr. Newell showed the following:

A. He had never appraised any land in the Idaho Falls area previously, (p. 186)

B. Made very cursory examination of decreed water rights, (p. 193).

C. Had been furnished with appraisal reports made by other U. S. appraisers prior to examination of premises, (p. 188).

D. Despite complete lack of familiarity with the Swan Valley area, he made only the following trips to the Ruud ranch in order to determine value:

1. On March 30, 1955, with Bureau of Reclamation official in charge of land procurement, after being furnished with reports of other government appraisers, at a time when the ground was covered with snow (p. 155 and p. 188).

2. May 20, 21, 22. On May 20 did not appraise Ruud place. On May 21 went over Ruud place (over 1,000 acres), checked buildings and land. On May 22, went over Ruud place and place

across river belonging to another party, saw farmers planting crops and talked with farmers, (p. 156).

3. August 10, 1955, after condemnation proceedings underway, in company with United States attorney, went to farm to **determine yield.** Made appraisal on basis of yields observed at that time (p. 157, 161).

The other government witness, Mr. Carruthers based his opinion as to what the land would produce, upon stacks of hay in the fields (p. 213) at a time, when according to Ruud, the land had been out of crop rotation and in grain for the last three or four or five years (p. 346-357)

Stipulation of parties to this suit shows that the Palisades Dam was authorized on December 9, 1941, and reauthorized on September 30, 1950 (p. 280).

From 1945 or 1946 on, Government appraisers were on the Ruud land, and he was uncertain as to the length of time he could keep his land, and as a result changed his operations to the point where he has been raising grain for a much longer period than normally would occur, so that the yields of the crops at the time of the final appraisal, the appraisal on which the Government based its valuation for taking, were not truly representative of the yield the lands were capable of producing (p. 357, 358, 239).

The Declaration of Taking was filed March 4, 1955 (p. 15).

The appellants had for a period of three, four or maybe five or six years, been compelled to lease the land to other individuals after the construction of Palisades dam. This was necessary due to labor shortage caused by the construction of the dam, and uncertainty as to the length of time the Government would permit appellant to operate his land (R 357)

The land then, had been cropped to grain by the tenants for this extended period, which admittedly did not put the land to the highest and best use, and tended to run the ground down. This was not proper practice in farming, but was all that could be done under the circumstances, with imminent prospect of losing the land by condemnation.

At the start of condemnation, then, the land was appraised by the yield which the land was producing at that time. This, despite uncontradicted testimony that the land was out of rotation, had been cropped to grain for several years, yields were low, and the land was not being put to its highest and best use.

The testimony further shows that the tenants had not irrigated the premises, and that irrigation was injurious to the barley, causing a second growth.(p. 346)

The appellants had been harassed by government appraisers since 1945 or 1946; were unable to tell from year to year whether they would be on the place the next crop year, of necessity caused by this uncertainty and labor shortage due to dam construction, they had to discontinue his crop rotation and limit irriga-

tion on a large portion of the ranch. (p. 357, 239, 358)

They are compelled to accept a fair market value based upon production of land, in 1955, under these circumstances. The verdict is neither equitable nor just, and does not measure up to the requirements of just compensation that is guaranteed the appellants by all laws. The appellants have devoted their entire life to improvement and building up of the condemned property and should not be compelled to accept an award of "just compensation" based on this record.

The Court Erred in Refusing to Grant a New Trial

The law is settled that the authority to grant a new trial is based upon the common law principle that it is the duty of a presiding judge to set aside the verdict and grant a new trial. The judge has the responsibility to see that justice is done in each particular case.

A trial judge should not hesitate to set aside the findings of a jury to grant a new trial in a case where the ends of justice so require, and to prevent a miscarriage of justice.

Felton vs. Spire
78 Fed. 576

SUMMARY

The cumulative effect of the innuendo that the other defendants have reached amicable settlement with the United States, the refusal to permit the witnesses who were best informed as to the use and productivity of the premises to testify as to the highest and best use and the fair market value, permitting only one farmer, a complete stranger in the area, a government appraiser, to furnish an opinion to the jury; the inherent injustice of an appraiser making an appraisal, when he is totally unfamiliar with the premises and has been furnished with the reports of prior government appraisals, and who based his appraisal on current production, at a time when the land admittedly is not being put to its highest and best use is manifestly unjust.

The appellants are entitled to have the verdict set aside and a new trial granted them before another jury.

Respectfully submitted,

HOLDEN, HOLDEN & KIDWELL

By William S. Holden

William S. Holden
A member of the Firm
Attorneys for Appellants
Residence & P. O. Address
Idaho First Nat'l. Bank Bldg.
Idaho Falls, Idaho

I certify that three copies of above Brief were mailed to Counsel for Appellee this 19th day of August, 1957.

William S. Holden

William S. Holden